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BUJANG HJ ULIS

v.

NANCY ABDULLAH

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HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-107-2005-II]
4 APRIL 2007

C ***CIVIL PROCEDURE:*** *Parties - Joinder of parties - Appeal against order for interveners to be added as parties - Whether interveners have a right in subject matter of suit - Whether requirements necessary to intervene satisfied - Rules of the High Court 1980, O. 15 r. 6 - Courts of Judicature Act 1964, ss. 16, 17 - Whether appeal dismissed*

D ***CIVIL PROCEDURE:*** *Judgment - Default judgment - Appeal against decision to set aside default judgment - Whether default judgment wrongfully obtained under O. 13 r. 1 Rules of the High Court 1980 - Whether claim against first defendant a liquidated claim or merely a discretionary relief - Whether appeal dismissed*

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The appellant/plaintiff appealed against the decision of the deputy registrar ordering (i) the interveners (the respondents/second and third defendants) to be added as defendants in the suit and (ii) setting aside the default judgment dated 21 December 2005 F (default judgment). The appellant in this action was claiming against the first defendant and seeking an order that the defendant transfer all her shares in the firm to the appellant and a declaration that any transfer of all her shares or part thereof in the firm to any person or persons made between the dates of the G trust deed, if any, as null and void. The cause of action arose based on a purported breach of the terms of a trust deed ('trust deed') dated 25 May 2001 between the appellant and the first defendant. The first defendant had agreed to hold 100% of the shares in a firm known as Zabare Motor Trading ('the firm') for H the benefit of the appellant. On 31 December 2004, the appellant had requested the first defendant to transfer the said shares but the first defendant had refused and, in consequence, the appellant was seeking the reliefs stated above. The first defendant did not enter an appearance and in consequence, the appellant had, I pursuant to O. 13 r. 1 of the Rules of the High Court 1980 ('the RHC 1980') entered default judgment. The respondents filed an

application (encl. 12) to intervene and set aside the default judgment which was allowed by the deputy registrar. Hence, this appeal. The second defendant, in support of encl. 12, filed an affidavit stating (1) that he had become a partner of the firm in March 2002 and two-thirds of the firm's share was transferred to him and the first defendant who held the remaining one third (2) in September 2005, 60% of the shares of the firm was transferred to the third defendant and subsequently in February 2006 the second defendant became 100% share holder of the firm (3) sometime before February 2006, 100% of the firm was transferred to the plaintiff without the knowledge of the second and third defendants and the default judgment was irregularly entered and ought to be set aside *ex debito justitiae*. The appellant objected to the interveners' application and in support of the appeal submitted that his action was based on the trust deed and was purely against the first defendant who was dutybound to transfer all the shares in the firm to the appellant and the proposed interveners were not parties to the deed of trust. The issues that arose were whether the interveners were rightly made as defendants in this suit and if so whether the default judgment ought to be set aside as of right on the grounds that it was irregularly obtained.

Held (dismissing the appellant's appeal with costs):

(1) To succeed in an interveners' application, the applicants have to show that they have a right in the subject matter of the suit and want to be made a party to protect their interest. The right to be heard by an aggrieved party is a fundamental right within the spirit and letters of the Federal Constitution. In cases where third parties' rights are affected, the spirit of the constitution is advocated through O. 15 r. 6 of the Rules of the High Court 1980 ('RHC') and its like, formulated by the rules committee headed by the Chief Justice, pursuant to ss. 16 and 17 of the Courts of Judicature Act 1964 ('CJA 1964') for one purpose, that is to ensure that the arguments and rights of third parties, who are going to be affected or will be affected by the order of court, are heard and proper reliefs are granted to the relevant parties according to the justice of the case. Having perused the authorities and the facts of the case, the respondents have a direct interest in the subject matter of the suit and they have satisfied the requirements necessary to intervene in this case. (paras 9, 10 & 17)

(2) The claim against the first defendant was not a liquidated claim and in consequence a default judgment under O. 13 r. 1 of the RHC 1980 would not apply. The appellant had wrongfully and in breach of procedural rules, obtained a default judgment under O. 13 r. 1 of the RHC 1980. The default order procured was not only a nullity but also illegal and need to be set aside upon the application of an aggrieved party. Notwithstanding the breach of procedural rules, the appellant without conceding submits in length to sustain the default judgment. This could not be done as the appellant's claim was not a liquidated claim and in fact he was claiming discretionary relief. In consequence, the court could not grant a default order. The appellant's claim was not liquidated or unliquidated claim but only a discretionary relief and for reasons stated above, this court dismissed the appellant's appeal. (para 19, 21 & 22)

Case(s) referred to:

Ang Tun Cheong v. Lim Yeok Beng (Public Bank, Intervener) [2002] 8 CLJ 29 HC ***(refd)***

Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin Dato' Mohd Jarjis [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 SC ***(refd)***

Badiaddin Mohd Mohidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors [1989] 1 CLJ 912; [1989] 1 CLJ (Rep) 444 HC ***(refd)***

Gula Perak Bhd v. Varghese Mathai [1988] 3 MLJ 358 ***(refd)***

Kheng Chwee Lian v. Wong Tak Thong [1983] 2 CLJ 191; [1983] CLJ (Rep) 195 FC ***(refd)***

Mahinder Singh v. Amanah Saham Pahang Bhd & Anor [1984] 1 CLJ 181; [1984] 2 CLJ (Rep) 205 HC ***(refd)***

Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***

RHB Bank Bhd v. Tan Boon Paw Kuching High Court (OS No: 24-233-2000-II) (Unreported) ***(refd)***

Syarikat Joo Seng v. Habib Bank Ltd [1986] 2 MLJ 129 ***(refd)***

Tan Khiaw v. Gan Chye Khoon [1983] 1 CLJ 292; [1983] CLJ (Rep) 404 FC ***(refd)***

Tengku Jaya Raja Hassan v. Mohamed Zakari & Anor, Talasco Insurance Sdn Bhd Intervener [1987] 2 MLJ 97 ***(refd)***

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1989] 1 CLJ 1128; [1989] 2 CLJ (Rep) 575 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176
Courts of Judicature Acts 1964, ss. 16, 17, 32, 33, 34
Rules of the High Court 1980, O. 13 rr. 1, 7, O. 14, O. 15 r. 6(2)(b)(ii), O. 19 rr. 2, 3, 4, 5, 7(1), O. 42 r. 12, O. 83 r. 1
Rules of the Supreme Court 1957, O. 16 r. 11
Trade Description Act 1972, s. 16

For the appellant - Jimmy Simon Maja; M/s Maja, Ngui & Co
For the respondent/interveners - James Lo; M/s George Lo & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant/plaintiff's appeal against the decision of the learned deputy registrar ordering (i) the interveners (now the respondents/2nd and 3rd defendants) to be added as defendants in the suit; and (ii) setting aside the default judgment dated 21 December 2005 (hereinafter referred to as default judgment).

[2] The appellant in this action is claiming against the 1st defendant and seeking, *inter alia*, the following reliefs namely: (a) an order that the defendant transfers all her shares in the firm to the plaintiff; and (b) a declaration that any transfer of all her shares or part thereof in the firm to any person or persons made between the dates of the trust deed, that is 25 May 2001 and 1 January 2005, if any, is null and void.

[3] The cause of action arose based on a purported breach of the terms of a trust deed dated 25 May 2001 between the appellant and the 1st defendant. The 1st defendant had agreed to hold 100% of the shares in a firm known as Zabare Motor Trading (hereinafter referred to as the Firm) for the benefit of the appellant. The appellant on 31 December 2004 had requested the 1st defendant to transfer the said shares but the 1st defendant had refused and, in consequence, the appellant is seeking the reliefs stated above. The 1st defendant did not enter an appearance and in consequence, the appellant had, pursuant to O. 13 r. 1 of the Rules of the High Court 1980 ("the RHC

A 1980"), entered default judgment on 21 December 2005 (emphasis is mine). The respondents on 8 August 2006 filed an application (encl. 12) to intervene and set aside the default judgment which was allowed by the learned Deputy Registrar. This is the subject matter of this appeal.

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[4] The 2nd defendant, in support of encl. 12 had filed an affidavit and stated, *inter alia*, as follows:

(a) the 2nd defendant became a partner, of the Firm in March 2002 and two-thirds of the Firm's share was transferred to him and Nancy binti Abdullah, the defendant, (1st defendant) who held the remaining one third.

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(b) in September 2005, 60% of the shares of the Firm was transferred to Buang bin Bolhassan, (3rd defendant) by me and the 1st defendant and thereafter I held 10%, the 1st defendant held 30% and the 3rd defendant held 60% of the Firm's share until February 2006 wherein after, my shares and the 1st defendant's shares was transferred to the 2nd defendant and thereafter the 2nd defendant became 100% share holder of the Firm.

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(c) sometime before February 2006, 100% of the Firm was transferred to the plaintiff without the knowledge of the 2nd and 3rd defendants. The 2nd and 3rd defendants came to know of the same in June 2006 and that too only as a result of an enquiry made by our solicitors at the business registry. The solicitors were informed that pursuant to a trust deed dated 25 May 2001 and a default judgment dated 21 December 2005 the shares were transferred as per the court order.

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(d) the default judgment was irregularly entered and ought to be set aside *ex debito justitiae*; even if the default judgment were valid, it had only directed the 1st defendant to transfer her shares in the Firm to the plaintiff and it does not direct the 2nd defendant or the 3rd defendant. In consequence, the default judgment cannot affect the rights and proprietary interests of the 2nd and 3rd defendants in the Firm.

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[5] The appellant in opposing the respondent's affidavit said, *inter alia*, as follows:

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(a) the default judgment was regularly entered against the defendant.

(b) under the deed of trust, the 1st defendant was bound to hold on trust all the 100% of the shares, right title and interest in the Firm for the appellant until 31 December 2004 and thereafter she was to transfer all shares to the appellant. However, after 31 December 2004, the defendant failed, refused and neglected to transfer all the shares to the appellant, notwithstanding a demand was made by him.

(c) as per the said deed of trust, the 1st defendant and appellant alone are the parties involved in the cause of action and the other defendants are not privy to it; therefore, the other defendants cannot be made a party to this action.

(d) the 2nd defendant's cause of action should be against the 1st defendant only, as she was the one who transferred the shares to the 2nd defendant, despite the fact that she had made a deed of trust dated 25 May 2001. If the 1st defendant had improperly disposed of her shares to the 2nd defendant as alleged, then the recourse to remedy for the 2nd defendant is to take legal action for recovery of her loss and/or damage from the 1st defendant.

(e) on acquiring the default judgment against the defendant, the appellant was able to proceed with the registration of his share in the Firm giving him 100% shares in the said Firm. The recourse for the 2nd defendant should be against the 1st defendant and/or the business registry, if she considers herself to be unsatisfied with the registration of the shares.

[6] In opposing the appellant's appeal, the respondent, *inter alia*, setting out the facts, submits as follows:

(a) the plaintiff had filed this action without the knowledge of the interveners and obtained default judgment in breach of the rules of court and managed to transfer all of the Firm's share on to his name. As a result, the interveners' propriety rights in the Firm have been affected and the interveners ought to intervene and the default judgment set aside.

(b) the plaintiff's claim does not consist of a liquidated demand (see O. 19 r. 2 RHC 1980); but relates to unliquidated damages (see O. 19 r. 3), detention of immovable property (see O. 19 r. 4) and possession of immovable property only (see O. 19 r. 5). This being the case, the plaintiff should have complied with O. 19 r. 7(1) and applied for leave to enter judgment against the defendant. Instead, the plaintiff had filed the default judgment without any application by summons supported by affidavit. In the circumstances, the default judgment was irregularly entered by the plaintiff and ought to be set aside *ex debito justitiae* as held in the Supreme Court case of *Syarikat Joo Seng v. Habib Bank Ltd* [1986] 2 MLJ 129.

(c) if the default judgment is deemed to be valid, it can be said that the default judgment had only directed the 1st defendant to transfer her shares in the Firm to the plaintiff. It is trite that the order cannot affect the rights and proprietary interests of unnamed parties as decided in the case of *Kheng Chwee Lian v. Wong Tak Thong* [1983] 2 CLJ 191; [1983] CLJ (Rep) 195, 2000 where George Seah FJ opined:

> In our judgment, the Court, below has no jurisdiction inherent or otherwise, over any person other than those properly brought before it, as parties or as persons treated as if they were parties under statutory provisions (*Brydges v. Brydges & Wood* [1909] p. 187; *Re Shephared* [1890] 43 Ch D 131 and *Coleman v. Coleman* [1920] p. 71). The terms "judgment" and "order" in the widest sense may be said to include any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court [see para. 501 of *Halsbury's Laws of England* (4th Edn.,) Vol., 26 at p. 237] and at para. 550 the following passage appears:
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> > Subject to appeal and to being amended or set aside, a judgment is conclusive as between the parties and their privies and is conclusive evidence against all the world of its existence, date and legal consequences.
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> We are constrained to agree with the submission of learned Counsel for the interveners that the order of the learned Judge was wholly irregular insofar as it purports to affect the registered title, share and interest of the said interveners in the said land when they had not been made parties or

given a full opportunity of taking part in the proceedings in the Court below. If the respondent had wanted the whole one-half share in the said land in pursuance of the first agreement after knowledge of the registration of these transfers by the appellant to her five sons, he ought to have joined the sons and particularly Soon Hup Cheng as co-defendants in the proceeding.

(d) the proposed interveners' joinder as parties to these proceedings and their presence before the court is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon. There exists a question or issue between the plaintiff and the proposed interveners (namely ownership of their proportionate shares of the Firm) arising out of or relating to or connected with the relief or remedy sought by the plaintiff which would be just and convenient to be determined as between the plaintiff and the proposed interveners. The respondents rely on the unreported case of *RHB Bank Bhd v. Tan Boon Paw* Kuching High Court OS No. 24-233-2000-II dated 29 May 2006 where it was stated:

> What is the test in dealing with an application to intervene in proceedings under O. 15 r. 6 RHC? The *locus classicus* case which is well accepted is *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52, Lord Diplock said (at page 55):
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> > The cases illustrate the great variety of circumstances in which it may be sought to join an additional party to an existing action. In their Lordships' view one of the principal objects of the rule is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. To achieve this object calls for a flexibility of approach which makes it undesirable in the present case, in which the facts are unique, to attempt to lay down any general proposition which could be applicable to all cases.
>
> Expanding further on whether a proposed intervener should possess a 'legal interest' to differentiate it from a 'commercial interest' the Privy Council in the same case expressed:

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> It has been sometimes said as in *Moser v. Marsden* and in *In re I.G. Farbenindustrie A.G.* that a party may be added if his legal interests will be affected by the judgment in the action but not if his commercial interests only would be affected. While their Lordships agree that the mere fact that a person is likely to be better off financially if a case is decided one way rather than another is not a sufficient ground to entitle him to be added as a party, they do not find the dichotomy between "legal" and "commercial" interests helpful. A better way of expressing the test is: will his rights against or liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in the action?

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Now, will the Claimant's rights to any party to the action in respect of the subject of the action be directly affected by any order which may be made in this action? Such test has been clarified further in *Arab Malaysian Merchant Bank Bhd v. Jamaludin bin Dato' Mohd Jarjis* [1991] 1 MLJ 27 at page 28 where Gunn Chit Tuan SCJ (as he then was) said:

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> One of the class of cases covered by the said rule, which allows intervention by persons not parties, is where the proprietary or pecuniary rights of the intervener are directly affected by the proceedings or where the intervener may be rendered liable to satisfy any judgment directly or indirectly. The ambit of this class has been materially widened by the decision of the UK Court of Appeal in *Gurtner v. Circuit,* the effect of which is to include any case in which the intervener is directly affected not only in his legal rights but in his pocket. In this connection, we would refer to and respectfully adopt the following dictum of Lord Denning MR, in that case, in which His Lordship said as follows:

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> It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves

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the object of the rule. It enables all matters in dispute to be effectually and completely determined and adjudicated upon between all those directly concerned in the outcome.

(e) applying the authorities, it is clear that the proposed interveners' proprietary and pecuniary rights, *viz*. their shareholding in the Firm which was summarily taken from them, was directly affected by the plaintiff's action. Allowing the proposed interveners to be added as defendants would achieve the object of O. 15 r. 6(2)(b) RHC 1980, as it enables all matters in dispute to be effectually and completely determined and adjudicated between all those directly concerned in the outcome. The case of *Ang Tun Cheong v. Lim Yeok Beng (Public Bank, Intervener)* [2002] 8 CLJ 29 supports this notion.

[7] The appellant on the facts of this case and the law, in an unusual manner, vehemently objects to the interveners' application which was allowed by the learned deputy registrar, the full submission of which I do not wish to set out here. In support of the appeal, the appellant, *inter alia*, submits as follows:

(a) the plaintiff is not obliged to search the business registry before he commences the action against the 1st defendant. The plaintiff's action against the 1st defendant is based on the trust deed. Hence the plaintiff's action is purely against the 1st defendant and she is duty bound to transfer all the shares in the Firm to the plaintiff.

(b) the proposed interveners are not parties to the deed of trust. If the 1st defendant had wrongly transferred the shares to the proposed interveners then it is for the proposed interveners to commence an action against the 1st defendant to recover the considerations which have been given to the 1st defendant who had earlier transferred the shares to the proposed interveners. In this case, the 2nd and 3rd defendants are not affected; the appellant relies on the case of *Arab Malaysian Merchant Bank Bhd v. Dr Jamaludin bin Dato Mohd Jarjis* [1991] 2 CLJ 862; [1991] 1 CLJ (Rep) 19 and *Tohtonku Sdn. Bhd. v. Superace (M) Sdn. Bhd.* [1989] 1 CLJ 1128; [1989] 2 CLJ (Rep) 575.

[8] I have considered both the submissions in detail. To determine the fate of this appeal, I have to decide, (i) whether the interveners were rightly made as defendants in this suit and if so whether the default judgment ought to be set aside as of right on the grounds that it was irregularly obtained and/or (ii) it has to be set aside on the grounds that the respondents have meritorious defence to the appellant's claim.

[9] To succeed in an interveners' application, the applicants have to show that they have a right in the subject matter of the suit and want to be made a party to protect their interest. They must comply with the procedural requirement to intervene as set out in O. 15 r. 6(2)(b)(ii) of the RHC 1980.

[10] The law on interveners is almost well settled and is inextricably interwoven with the rules of natural justice. In fact, in my view, it is nothing but an extension of the rules of natural justice related to the principles of *audi alteram partem* ie, the right to be heard. This principle is advocated through rules of procedure such as O. 15 r. 6 of the RHC 1980. However, intervener's right is not a substantive right. If it is, it will be specifically reflected in one of the Acts of parliament. This is not the case. It is essentially a necessary and a discretionary relief to be exercised by the courts according to the justice of the case for the proper administration of justice. This is to make sure that proper parties to the dispute are heard and also to ensure that the administration of justice is not put to disrepute by litigants by not naming all the parties who will be affected by the decision of the court. Being a discretionary relief, the decision to admit the interveners by the 1st instant court, although by the learned deputy registrar, should not ordinarily be disturbed. It must be emphasized here that the right to be heard by an aggrieved party is a fundamental right within the spirit and letters of the Federal Constitution. In cases where third parties' rights are affected, the spirit of the constitution is advocated through O. 15 r. 6 RHC 1980 and its like, formulated by the rules committee headed by the Chief Justice, pursuant to ss. 16 and 17 of the Courts of Judicature Acts 1964 (CJA 1964) for one purpose, that is to ensure that the arguments and rights of third parties, who are going to be affected or will be affected by the order of court, are heard and proper reliefs are granted to the relevant parties according to the justice of the case. This would ensure that

multiplicity of proceedings is arrested in limine. The limitation to this is that it can only be done according to the rules of procedure and provided that the intervener can satisfy the threshold requirement set out in case laws. This is so for the reason that the intervener is a person who is not originally a party to the suit, but is a person claiming an interest in the subject matter and wants to be made a party to the suit in order to protect his interest. It is trite that the court does not allow the right to be heard to busy bodies and such like who have no direct interest other than one of commercial in nature.

[11] The test in determining whether an applicant ought to be given leave to intervene is whether the applicant's rights against or liabilities to any party to the action, in respect of the subject matter of the action, will be directly affected by any order which may be made in the action.

[12] In the case of *Tohtonku Sdn Bhd., (supra)* the applicant obtained an *ex parte* order under s. 16 of the Trade Description Act 1972 declaring that the intervener's trade mark was in infringement of the applicant's rights in respect of its registered trade mark. The intervener applied to set aside the order. The applicant raised two preliminary objections to the intervener's application: (a) the intervener had no *locus standi* as he had no interest in the matter at all and a mere commercial interest was not sufficient. (b) as the order of court had been perfected, the court could not review it any longer and the intervener could only proceed by way of a separate action. The court stated that a person who wants to intervene must show that he has some interest which is directly related to the subject matter of the action. A mere commercial interest in the outcome is not enough. One will be allowed to intervene only if his rights or liability in respect of the subject matter of the action will be directly affected by any order of the court in the action. It was held by the Privy Council in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52 that one of the principal objects of O. 16 r. 11 of the former Rules of the Supreme Court 1957, is to enable the court to prevent injustice being done to a person whose right will be affected by its judgment, by proceedings to adjudicate upon the matter in dispute in the action without he being given an opportunity of being heard.

[13] The principle stated in *Pegang Mining Co Ltd (supra)*, was adopted by the Supreme Court in the case of *Arab Malaysian Merchant Bank Bhd v. Jamaludin bin Dato Mohd Jarjis (supra)*. The issue before the Supreme Court was whether the order made by the High Court allowing the respondent to intervene was right. The appellants obtained judgment against the debtors. The respondent who was not a party to the action agreed to pay the appellants by way of instalments in consideration of the appellants refraining at his request from enforcing the judgment against the judgment debtors. Due to some financial difficulties, the respondent was not able to meet with the instalments, and also realised that the judgment was irregular, as the interest ordered to be paid in the judgment exceeded the amount under O. 42 r. 12 of the RHC 1980. In order to set aside the judgment the respondent applied for leave to intervene and to be made a party to the action. The High Court allowed the application of the respondent. The appellant's appeal to the Supreme Court was dismissed.

[14] In *Gula Perak Bhd v. Varghese Mathai* [1988] 3 MLJ 358, the petitioner Gula Perak presented a petition to seek the sanction of the court for a scheme of arrangement, pursuant to s. 176 of the Companies Act between the petitioners and its unsecured creditors, in respect of the unsecured debts of the petitioner. The secured creditors had waived a substantial portion of the claim to enable the scheme of arrangement to succeed. The intervener, Mr. Mathai was a minority shareholder in Telok Plantation Sdn Bhd (TP) and other companies which controlled the petitioner. TP was the biggest creditor of the petitioner. The intervener contended that the basis of the proposal for TP to go along with the proposed scheme of arrangement was erroneous and ran foul of prudent management and business sense, and he was thereby affected. The court held that to succeed in an application to intervene, the intervener must show that there is a question or issue to be tried between the intervener and the parties to the action. Since TP as well as the other secured creditors were not parties to the action, the court decided that this did not satisfy the rule.

[15] Rules do not impose time limit for an intervener to intervene in a proceeding. However, case laws show that if a person wants to intervene in proceedings, he must act promptly. In *Tengku Jaya bin Raja Hassan v. Mohamed bin Zakari & Anor, Talasco Insurance Sdn Bhd Intervener* [1987] 2 MLJ 97, the plaintiff had obtained an interlocutory judgment against both defendants and thereafter by assessment of damages, obtained final judgment against both defendants. More than a year later, the 1st defendant applied to set aside the judgment on the grounds of irregularity and that he had merits in his defence. The court on the facts held that there was no irregularity and that the defendant had failed to produce sufficient evidence to state that he had a *prima facie* defence. The court further stated that since the insurers had already been served with the notice pursuant to the Road Traffic Ordinance 1958 before the commencement of the proceedings, and since the insurers did not take proper steps to protect their interest from the beginning of the proceedings and there was sufficient delay in intervening, they should be precluded from intervening. Abdul Malek J opined:

> On these considerations and guided by the applicable authorities cited, I saw no reason to set aside the interlocutory judgment given on October 3, 1983 and final judgment given on December 8, 1984 against both defendants or to allow the insurers the liberty to intervene at this late stage. Accordingly, I dismissed the appeal against the order of the Senior Assistant Registrar with costs.

[16] In *Tan Khiaw v. Gan Chye Khoon* [1983] 1 CLJ 292; [1983] CLJ (Rep) 404, it was stated that any application for intervention or to be added as a party to any existing proceedings should be made promptly.

[17] Having perused all the authorities above and the facts of the case, I am satisfied and can come to the conclusion that the respondents have a direct interest in the subject matter of the suit and that they have satisfied the requirements necessary to intervene in this case.

[18] The next issue is to see whether the judgment in default ought to be set aside as of right. The respondents in my view have wrongfully submitted in reliance of various provisions of O. 19 RHC 1980 which relates to claim in respect of liquidated, unliquidated, damages, etc; where appearance has been entered

but defence is not filed. In this case, a certificate of non appearance has been entered pursuant to O. 13 r. 7 RHC 1980 and that means that the 1st defendant had not filed his appearance. In consequence, the default provisions in O. 13 RHC 1980 will apply in this case and not O. 19. As the respondents have not stated the right provisions of the rule and to stress that solicitors if they make use of the rules in the right perspective will help to reduce backlog, it is necessary for me to adumbrate the principles and application of these orders for the following claims namely:

(a) Liquidated Sum

A liquidated sum is a genuine pre-estimate of money due and payable under a contract. It must be capable of being ascertained by mere matter of arithmetic. Where the claim by the plaintiff is for a liquidated sum and the defendant fails to enter an appearance within the stipulated period, then the plaintiff can enter final judgment for a sum not exceeding that claimed by the writ in respect of the demand and for costs. In *Mahindar Singh v. Amanah Saham Pahang Bhd & Anor* [1984] 1 CLJ 181; [1984] 2 CLJ (Rep) 205 VC George J observed:

> A liquidated demand is in the nature of a debt ie, a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'.

(b) Unliquidated Sum

Where the plaintiff's claim is for unliquidated damages and the defendant fails to enter an appearance within the stipulated period, then the plaintiff may enter interlocutory judgment against the defendant for damages to be assessed and costs. An unliquidated sum as opposed to a liquidated sum is a sum which cannot be ascertained by precise mathematical calculation. In *Credit Corporation (M) Bhd v. Bulan Sabit Sdn Bhd & Ors* Shankar J observed:

> one cannot convert an unliquidated claim to a liquidated one merely by putting down some allegedly precise mathematically calculation. What is reasonable in any particular case is more than a matter of mathematics.

Generally, in any action there are two issues; one the issue as to liability, and the other as to quantum. Where the claim is for a liquidated sum and the defendant does not enter appearance, the plaintiff can enter final judgment, wherein the court declares the liability and quantum and there remains nothing more to be done. However, if it is an unliquidated claim and the defendant does not enter appearance, only then can the plaintiff enter interlocutory judgment and the quantum of liability would need to be assessed. Assessment of quantum normally takes place by way of separate application made by the plaintiff, wherein the plaintiff will be required to prove his claim, subject to the normal rules of procedure and rules of evidence.

(c) Claim in Detinue

Where the plaintiff's claim is in relation to the detention of movable property and if the defendant fails to enter appearance, the plaintiff may at his option enter either: (i) interlocutory judgment against the defendant for the delivery of the property or their value to be assessed and cost; or (ii) interlocutory judgment for the value of the property to be assessed and costs.

(d) Claim for Possession of Immovable Property

Where the plaintiff's claim is for possession of immovable property and the plaintiff does not claim any relief under O. 83 r. 1 RHC 1980 and the defendant does not enter appearance within the stipulated time, the plaintiff may enter judgment after producing a certificate by his solicitor or an affidavit stating that he is not claiming any relief in the nature specified in O. 83 r. 1 and enter judgment for possession of the immovable property with cost.

(e) Mixed Claim

Where the plaintiff's claim is a mixed claim and the defendant fails to enter appearance within the stipulated period, the plaintiff may enter judgment in respect of any such claim as he would be entitled to enter under any provisions set out under O. 13.

(f) Other Claims

Where the plaintiff's claim is one which does not fall within any one of the above claims and the defendant fails to enter appearance within the stipulated period, then the plaintiff can proceed with the action as if the defendant had entered an appearance. In such case, there must be an affidavit of service filed and defence served before the plaintiff can proceed under O. 14 RHC 1980 for summary judgment or under O. 19 r. 7 for default of defence, or for other orders as the case may be.

[19] It is glaringly obvious that the claim against the 1st defendant is not a liquidated claim and in consequence a default judgment under O. 13 r. 1 of the RHC 1980 will not apply. In this case, the appellant has wrongfully and in breach of procedural rules, obtained a default judgment under O. 13 r. 1 of the RHC 1980 on the following terms: (a) the defendant transfers all her shares in the firm Zabare Motor Trading to the plaintiff; and (b) any transfer of all the defendant's shares or part thereof in the firm Zabare Motor Trading to any person or persons made between the dates of the trust deed which is 25-05-01 and 1-01-05, if any, is null and void; and (c) costs.

[20] The default order the plaintiff has procured is not only a nullity but also illegal and need to be set aside upon the application of an aggrieved party as set out by the Federal Court in *Badiaddin bin Mohd Mohidin & Anor v. Arab-Malaysian Finance Berhad* [1998] 2 CLJ 75. In addition to the principles enunciated in this case, in my view it must not be forgotten that civil courts are also conferred with supervisory jurisdiction in a limited sense to arrest any form of injustice on the court's own motion, pursuant to s. 32 to 34 of CJA 1964, a point which is not necessary for me to elaborate on for the purpose of this case.

[21] Notwithstanding the breach of procedural rules, the appellant without conceding submits in length to sustain the default judgment. This cannot be done as the plaintiff's claim is not a liquidated claim and in fact he is claiming discretionary relief. In consequence, the court cannot grant a default order. Any solicitor, who knowingly procures a default order in blatant breach of the rules, in my view, will tantamount to have obtained the order in a manner which is inappropriate. Solicitors must not forget that they are officers of court and answerable to the court and any form of

irregular conduct may be seen as an act of contempt or subject matter of complaint to the Advocates Disciplinary Board by the courts as well as the aggrieved parties. In the event the solicitors have done in ignorance of the rules and resist the application to set aside, then it will be an appropriate case when the default judgment is set aside for the learned deputy registrar to issue a notice to show cause why the solicitor's concern should not pay personally the costs of the application on a solicitor client basis to the applicant.

[22] It is my judgment that the appellant's claim is not liquidated or unliquidated claim but only a discretionary relief and for reasons stated above, I dismiss the appellant's appeal with costs and the costs to be paid to the 2nd and 3rd defendants, the respondents in this appeal.